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Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati: The Sixth Circuit Narrowly Construes Romer v. Evans

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EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. v. CITY OF CINCINNATI: THE SIXTH CIRCUIT NARROWLY CONSTRUES *ROMER v. EVANS*

INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment commands that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹ As Justice Harlan said, dissenting over a century ago in *Plessy v. Ferguson*,² the Constitution “neither knows nor tolerates classes among citizens.”³ This idealistic premise must be balanced against the practical consideration that most legislation results in burdening some persons while providing advantages to others.⁴ The Equal Protection Clause

¹ U.S. CONST. amend. XIV, § 1; *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (stating that the “Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities”); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (stating that the Constitution mandates that “all ‘persons’ shall be accorded the full privileges of citizenship”).

² 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (opposing majority holding that “separate but equal” did not violate equal protection), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³ *Id.* at 559.

⁴ *See* *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 271–72 (1979) (“Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by law.”); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (discussing a state’s discretion in classification for legislative purposes so long as the classification is reasonable and not arbitrary and is substantially related to the enforcement of the legislation); *see also* L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 285 (1997) (“[E]qual protection does not mean that laws apply universally to all persons . . . the government must be able to classify special groups or classes of persons for benefits or burdens if it is to function at all.”).

does not forbid the government from making classifications. It does, however, ensure fair treatment in the exercise of fundamental rights by forbidding governmental classifications that are based upon "impermissible criteria or [are] arbitrarily used to burden a group of individuals."⁵ The task of balancing these competing interests and applying equal protection falls on the courts, which must delicately measure a challenged law's validity against constitutional principles.⁶ In this century, the Supreme Court has determined that classifications based upon race⁷ and national origin⁸ are "suspect,"⁹ and that classifications based upon gender¹⁰ and illegitimacy¹¹ are "quasi-suspect." To date, the

⁵ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.2, at 597 (5th ed. 1995); J. Michael McGuinness, *Equal Protection for Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 CAMPBELL L. REV. 333, 356 (1996) (discussing *Esmail v. Macrane*, 53 F.3d 1761 (7th Cir. 1995), and noting it "reaffirms [that] the Equal Protection Clause is not limited to suspect classes or fundamental rights [and that] [t]he Equal Protection Clause is a foremost means for all individuals, regardless of status, in the limited arsenal of weapons to combat the increasingly abusive power of government").

⁶ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985) (explaining that courts are charged with the responsibility of deciding the validity of governmental actions and laws challenged as violative of equal protection); Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 626 (1994) (explaining that when Congress "has not used its authority under Section Five of the Fourteenth Amendment to pass appropriate legislation . . . the courts interpret the Constitution itself by referring to the equal protection jurisprudence that has evolved throughout the Court's decisions involving the Equal Protection Clause").

⁷ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (race); see also *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (school desegregation); *Cooper v. Aaron*, 358 U.S. 1 (1958) (same). The same principle applies to cases where other racial groups are impermissibly disadvantaged or given preferential treatment. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans).

⁸ See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (hinting that there might be circumstances where "statutes directed at particular religions, or national or racial minorities, [and] prejudice against discrete and insular minorities, may call for a correspondingly more searching judicial inquiry") (internal citations omitted).

⁹ NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 602.

¹⁰ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (noting that gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (establishing intermediate level scrutiny for gender-based cases); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (striking down law that preferred men over women as estate administrators).

¹¹ See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that intermediate scrutiny had traditionally applied to "discriminatory classifications based on sex or

Court has declined to extend either "suspect" or "quasi-suspect" classification to homosexual, lesbian, and bisexual Americans.¹² In fact, in *Bowers v. Hardwick*,¹³ the Supreme Court decided a case challenging the constitutionality of a state anti-sodomy law without reaching equal protection issues.¹⁴

Recently, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹⁵ the United States Court of Appeals for the Sixth Circuit held constitutional a city charter amendment that forbade the Cincinnati City Council from enacting any legislation which afforded gays protection against anti-gay discrimination in housing, employment, or public accommodation.¹⁶

In *Equality Foundation*, an amendment to the Cincinnati City Charter ("Charter Amendment" or "Amendment") was passed by a voter referendum in November 1993.¹⁷ The Amendment prohibited the City Council from passing any legislation that afforded gays "protected status" or "preferential treatment."¹⁸ Equality Foundation, Inc.,¹⁹ a local gay rights organization, brought suit in federal district court, challenging the

illegitimacy"); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (rejecting the argument that illegitimacy is a suspect class warranting strict scrutiny); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (applying intermediate scrutiny and concluding that denying an illegitimate child the right to bring a wrongful death action for the loss of his mother violates the Equal Protection Clause); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1553 (2d ed. 1988).

¹² NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 601; Louis Norvell, *Constitutional Law: Defining the Boundaries of Protected Intimate Associations*, 50 FLA. L. REV. 233, 240 (1998) (noting that the Supreme Court has held that homosexual conduct is not a protected fundamental right worthy of heightened judicial scrutiny).

¹³ 478 U.S. 186 (1986).

¹⁴ See *id.* at 201-02 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (disagreeing with "the Court's refusal to consider whether [the challenged Georgia statute] runs afoul of the . . . Equal Protection Clause of the Fourteenth Amendment" and observing that "the Equal Protection Clause [is not so] clearly irrelevant").

¹⁵ 128 F.3d 289 (6th Cir. 1997) (hereinafter *Equality Found. IV*), *cert. denied*, 119 S. Ct. 365 (1998) (mem. opinion by Stevens, Souter, and Ginsburg, JJ.).

¹⁶ See *id.* at 292 (adhering to its earlier decision that the charter amendment "offended neither the First nor the Fourteenth Amendments . . . and accordingly could stand as enacted by the Cincinnati voters").

¹⁷ See *id.* at 291 (referring to the Amendment as "Issue 3," "Article XII," and the "City Charter Amendment").

¹⁸ *Id.*

¹⁹ The Equality Foundation of Greater Cincinnati, Inc. was formed by gay-rights advocates to oppose the Cincinnati Charter Amendment. After the Cincinnati Charter Amendment's passage, the Equality Foundation among others commenced this suit. See Sharon Moloney, *Case Not Expected to Affect Cincinnati*, CINCINNATI POST, Feb. 21, 1995, at 3A, available in 1995 WL 6923799.

Amendment on equal protection, due process, and various First Amendment grounds.²⁰

The district court found for the plaintiffs and enjoined the City from enforcing the Charter Amendment.²¹ The City appealed, and the Sixth Circuit reversed,²² holding that the Amendment did not violate any constitutionally protected rights.²³ The Supreme Court granted certiorari,²⁴ but remanded the case to the Sixth Circuit for reconsideration in light of the Court's decision in *Romer v. Evans*,²⁵ which struck down a Colorado state constitutional amendment with language and effect similar to the Cincinnati Charter Amendment.²⁶ On remand, however, the Sixth Circuit adhered to its earlier decision and upheld the Amendment.²⁷

It is submitted that the Sixth Circuit misconstrued *Romer v. Evans*²⁸ in finding the Cincinnati Charter Amendment constitutional. As in *Evans*, the *Equality Foundation* Charter Amendment puts homosexuals in a separate class, not to support a legitimate governmental interest, but rather "to make them unequal to everyone else."²⁹ In order to enact legislation preventing anti-gay bias in Cincinnati, the Charter Amendment requires that proponents go through an arduous two-step process; first, amending the City Charter, and second, lobbying the City

²⁰ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 422 (S.D. Ohio 1994) (hereinafter *Equality Found. II*), *rev'd*, 128 F.3d 289 (6th Cir. 1997).

²¹ See *Equality Found. II*, 860 F. Supp. at 449.

²² See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 271 (6th Cir. 1995) (hereinafter *Equality Found. III*). *Equality Foundation* applied to the Supreme Court for certiorari. See 518 U.S. 1001 (1996). Although the Court granted certiorari, it vacated the judgment of the Sixth Circuit and remanded the case for reconsideration in light of the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the decision to remand. See *id.*

²³ See *Equality Found. III*, 54 F.3d at 271.

²⁴ See *Equality Found.*, 518 U.S. 1001 (1996).

²⁵ 517 U.S. 620 (1996). *Romer v. Evans* was decided in May 1996, not quite one month before the Supreme Court remanded the case to the Sixth Circuit for further consideration.

²⁶ See *id.* at 623 (striking down the state constitutional amendment on equal protection grounds); *infra* notes 109-32 and accompanying text (discussing *Evans*).

²⁷ See *Equality Found. IV*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

²⁸ 517 U.S. 620 (1996).

²⁹ *Id.* at 635 (holding that the Colorado Amendment classified homosexuals "to make them unequal to everyone else").

Council to enact the desired ordinance.³⁰ Legislation motivated by a "desire to harm a politically unpopular group,"³¹ as here, "cannot constitute a *legitimate* governmental interest."³²

Part I of this Comment briefly reviews the constitutional underpinnings of Fourteenth Amendment equal protection jurisprudence, the development of a tiered approach to judicial review, and examines the leading cases. Part II discusses the facts of *Equality Foundation*, and examines the rationale of the Sixth Circuit's decision. Part III suggests that the Sixth Circuit erred in applying *Evans*; this Part compares the facts of *Evans* to those of *Equality Foundation*, and concludes that *Evans*'s rationale should have been controlling. Part IV argues further that the Supreme Court should recognize that homosexuality as a status, as distinct from homosexual conduct, qualifies for quasi-suspect classification and intermediate-level review.

I. THE DEVELOPMENT OF EQUAL PROTECTION JURISPRUDENCE

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."³³ Essentially, it guarantees that "all persons similarly situated should be treated alike."³⁴ Further, "[s]ection 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection."³⁵ What follows is a brief exposition of the key considerations of

³⁰ See *Equality Found. II*, 860 F. Supp. 417, 428 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997) ("[A] provision of the City charter may not be repealed short of amending the charter itself. The charter amendment process . . . is a burdensome task . . . far more onerous than lobbying City Council . . . for favorable legislation.")

³¹ *Evans*, 517 U.S. at 634 (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

³² *Id.*

³³ U.S. CONST. amend XIV, § 1. Fourteenth Amendment jurisprudence has been developed elsewhere by eminent scholars. See generally NOWAK & ROTUNDA, *supra* note 5; TRIBE *supra* note 11; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). Rather than attempting to replicate work that has been done so well by others, what follows in the text is a brief exposition of the key considerations of equal protection analysis.

³⁴ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982)).

³⁵ *Id.* at 439-40; see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

equal protection analysis when state action is challenged:³⁶ first, a discussion of classifications and fundamental rights under the Equal Protection Clause; and second, an overview of the three tiers of judicial review: rational basis analysis, strict scrutiny, and intermediate scrutiny. As will be seen, the appropriate level of judicial review depends upon whether a fundamental right or a suspect or quasi-suspect class is affected by the challenged legislation.

A. Classifications and Fundamental Rights Under the Equal Protection Clause

1. Classifications

The Equal Protection Clause does not prevent the government from creating or applying laws that classify persons.³⁷ Classifications based upon legitimate governmental purposes that do not burden a fundamental right will be upheld.³⁸ If the classification is proper, equal protection analysis is irrelevant to a determination of whether a specific individual has been appro-

³⁶ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). The Court described a two-step inquiry to determine the presence of state action:

[F]irst, whether the claimed constitutional deprivation [of the private person's constitutional rights by the person alleged to be exercising state action] resulted from the exercise of a right or privilege having its source in [governmental] authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

Id. (citations omitted); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937-42 (1982) (discussing the two-part approach used in determining whether an action can be "fairly attributable to the State," and determining that when a private creditor acts jointly with state officers to secure property, Constitutional requirements of due process apply); NOWAK & ROTUNDA, *supra* note 5, § 12.1, at 470 ("[T]he Amendments to the Constitution which protect individual liberties specifically address themselves to actions taken by the United States or a state.").

³⁷ See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (acknowledging that most laws classify "for one purpose or another, with resulting disadvantage to various groups or persons"); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 271-72 (1979) ("The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."); NOWAK & ROTUNDA, *supra* note 5, § 14.2, at 597 (stating "equal protection . . . does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws . . .").

³⁸ See, e.g., NOWAK & ROTUNDA, *supra* note 5, § 14.2, at 597; see also *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) ("[L]egislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld . . . when the legislative means are rationally related to a legitimate government purpose.").

privately categorized; an equal protection challenge must focus on the law itself, rather than on any individual impact.³⁹ Thus, the first step in an equal protection challenge is to examine whether a law is under-inclusive,⁴⁰ over-inclusive,⁴¹ or both.⁴² Further, courts also examine whether the classification made by the state action affects either a "suspect"⁴³ or "quasi-suspect" group.⁴⁴

2. Fundamental Rights

There are two major groups of fundamental rights considered in an equal protection challenge. The first of these are those

³⁹ See NOWAK & ROTUNDA, *supra* note 5, § 14.2, at 597 ("Equal protection deals with legislative line-drawing . . ."); see also *Plyler*, 457 U.S. at 216 ("The Equal Protection Clause [is] intended as a restriction on state legislative action inconsistent with elemental constitutional premises."); *R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980) ("[T]he Court . . . has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.").

⁴⁰ See NOWAK & ROTUNDA, *supra* note 5, § 14.2, at 598-99. "An under-inclusive classification contains all similarly situated people but excludes some people who are similar to them in terms of the purpose of the law." *Id.*; see also *Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449, 459 (W.D. Mo. 1980) (quoting NOWAK & ROTUNDA).

⁴¹ See NOWAK & ROTUNDA, *supra* note 5, § 14.2, at 599. A law is "over-inclusive when the legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons." *Id.*

⁴² See *id.* "Many classifications can be said to be a mix of both over- and under-inclusions." *Id.*; see also *Evans*, 517 U.S. at 633 ("Amendment 2 . . . is at once too narrow and too broad [because] [i]t identifies persons by a single trait and then denies them protection across the board.").

⁴³ *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (originating the term, "suspect," in describing the standard of review which applies to "all legal restrictions which curtail the civil rights of a single racial group"). Classifications based on race or national origin are the classic "suspect" categories. See *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (school desegregation); *Cooper v. Aaron*, 358 U.S. 1 (1958) (same); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (race).

One startling aspect of *Brown* is that the Court did not look at the legislative history of the Fourteenth Amendment, which was passed as one of the Civil War Amendments, at a time when African Americans were often not educated. Rather, the Court examined contemporary education in 1954 to determine whether African American students were impermissibly disadvantaged by segregated schools. See *Brown*, 347 U.S. at 490. This illustrates that the Court will apply established principles to changing social values.

⁴⁴ See NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 603. "In both the illegitimacy and alienage cases the Supreme Court appears to be using an intermediate or middle level standard of review . . ." *Id.* In gender cases, however, "the Court . . . no longer treat[s] sex-based classifications with the judicial deference given economic regulations; however, it [is] equally clear that such classifications are not subject to the 'strict scrutiny' given to truly suspect classifications such as those based upon race." *Id.* at § 14.20, at 773.

rights explicitly granted in the Constitution, such as the right to freedom of speech granted by the First Amendment.⁴⁵ The other major area consists of fundamental rights the Supreme Court has found implied in the Constitution, such as the right to privacy,⁴⁶ the right to vote,⁴⁷ and the right to interstate travel.⁴⁸ The Court has found that some interests, such as housing, educa-

⁴⁵ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); *Whitney v. California*, 274 U.S. 357, 373 (1927) ("The right of free speech . . . [is a] fundamental right[]"); NOWAK & ROTUNDA, *supra* note 5, § 14.40, at 940-42 (discussing application of First Amendment rights to equal protection).

⁴⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding there is a right to privacy respecting a married couple's choice to use contraceptives); NOWAK & ROTUNDA, *supra* note 5, § 14.26, at 796 (stating that privacy, in equal protection and due process context, "relates to certain rights of freedom of choice in marital, sexual, and reproductive matters"); see also *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment[] . . .") (emphasis added).

⁴⁷ See generally *Dunn v. Blumstein*, 405 U.S. 330 (1972) (reviewing Tennessee's voting residency requirements with strict scrutiny and noting that while such requirements are legitimate, the right to vote is fundamental and unduly lengthy residency requirements are improper); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632-33 (1969) (striking down New York statute limiting eligibility to vote in school board elections to property owners or parents of children enrolled in the district); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667-68 (1966) (invalidating poll tax and noting that right to vote is fundamental); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (explaining that "the right of suffrage is a fundamental matter"); NOWAK & ROTUNDA, *supra* note 5, §§ 14.31-14.36, at 865-922 (discussing voting rights and the Equal Protection Clause).

⁴⁸ See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (striking down statute limiting non-emergency indigent medical care to residents of over one year, even though the Court acknowledged the restriction was not a likely to be a major inhibiting factor on interstate travel); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (invalidating state statutes that restricted qualification for welfare benefits to residents of more than one year on the grounds that such statutes impair the "fundamental right of interstate movement"); *United States v. Guest*, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our [nation]. It is a right that has been firmly established and repeatedly recognized."). See generally NOWAK & ROTUNDA, *supra* note 5, §§ 14.37-14.38, at 922-38 (discussing right to travel in the context of equal protection). But see *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (upholding Texas statute requiring applicants to supply proof of "bona fide" residence in the school district); *Starns v. Malkerson*, 326 F. Supp. 234, 241 (D. Minn. 1970) (upholding a residency requirement for lower tuition rates in state universities). The cases indicate that although interstate travel is seen as a fundamental right, the importance of the interest that allegedly inhibits such travel will be a strong factor courts will weigh in determining if that fundamental right has been infringed upon by challenged legislation.

tion, entitlement programs, and government employment, are not fundamental rights for equal protection purposes.⁴⁹

B. Judicial Review

Where a state action is challenged on constitutional grounds, there are arguably three main levels of judicial review. These are rational basis, strict scrutiny, and intermediate or heightened scrutiny.⁵⁰

1. Rational Basis

There is a strong presumption that legislation is constitutional.⁵¹ Courts must give legislatures great deference,⁵² maintaining the separation among the three branches of government conceived by the Founders.⁵³ Thus, the general rule is that a challenged law will stand as long as it is "rationally related to a legitimate state interest."⁵⁴ When this standard of review is ap-

⁴⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (public-school education); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (entitlements); NOWAK & ROTUNDA, *supra* note 5, §§ 14.42–14.46, at 946–59 (discussing non-fundamental rights). For a discussion concerning why the Supreme Court has denied homosexuality to be a fundamental right based on immutability and generality, see Daniel A. Batterman, Note, *Evans v. Romer: The Political Process, Levels of Generality, and Perceived Identifiability in Anti-Gay Rights Initiatives*, 29 NEW ENG. L. REV. 915 (1995).

⁵⁰ See NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 600–06.

⁵¹ See *Heller v. Doe*, 509 U.S. 312, 319 (1993) (stating that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity"); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

⁵² See *Cleburne*, 473 U.S. at 440 ("When social . . . legislation is at issue, the Equal Protection Clause allows the States wide latitude"); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974) (restating the oft-cited rule that social legislation will generally be upheld if it is reasonable and bears a rational relationship to a permissible state objective).

⁵³ See *Cleburne*, 473 U.S. at 440. ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process[.].").

⁵⁴ *Id.*; see also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (reiterating the general rule); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (holding that the standard required only a "plausible" rationale; and that once a plausible basis is established it is "constitutionally irrelevant whether this reasoning in fact under[lie]s the legislative decision"); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

plied, a plaintiff bears a heavy burden, and the law will usually stand.⁵⁵

2. Strict Scrutiny

Whenever a "suspect class"⁵⁶ or a "fundamental right"⁵⁷ is implicated by a challenged state action, courts apply strict scrutiny.⁵⁸ Under this approach, the burden shifts, and the state action will be upheld only if the state can show that the law is "narrowly tailored" to promote a "compelling"⁵⁹ governmental interest. "Suspect" classification was developed to ensure special

⁵⁵ See NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 601. "So long as it is arguable that the other branch of government had such a basis for creating the classification a court should not invalidate the law." *Id.*; see also *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (upholding state rent control because it was not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt") (internal citations omitted); *Borman's, Inc. v. Michigan Prop. & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir. 1991) ("The burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups . . . is an extremely heavy one.").

This is not to say that the rational basis standard can not be overcome; laws which are so far attenuated from the legitimate state interest asserted, or laws which support an illegitimate governmental purpose will be struck down under even a rational basis analysis. See *Romer v. Evans*, 517 U.S. 620, 634 (1996) (stating that a "disadvantage . . . born of animosity toward the class of persons affected" is not a legitimate government purpose); *Cleburne*, 473 U.S. at 446 (stating that laws "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (declaring that Alaska statute which offered dividends to longtime residents was not rationally related to state objectives and was therefore unconstitutional); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that "a bare . . . desire to harm a politically unpopular group" is not a legitimate state interest).

⁵⁶ See *supra* note 43 and accompanying text (discussing "suspect classifications," particularly those based on race or national origin).

⁵⁷ See *supra* notes 45-49 and accompanying text (discussing "fundamental" rights under equal protection analysis).

⁵⁸ See *Equality Found. IV*, 128 F.3d 289, 292 n.1 (6th Cir. 1997), *cert. denied*, 119 S. Ct 365 (1998).

Where a statute or ordinance uniquely and adversely impacts a "suspect class" such as one defined by race, alienage, or national origin, or invades a "fundamental right" such as speech or religious freedom, the rigorous "strict scrutiny" standard governs, whereby such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). Cf. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that since the aged are not deserving of 'suspect' classification, a state statute with a mandatory retirement provision was constitutional because it satisfied rational based scrutiny).

⁵⁹ *Cleburne*, 473 U.S. at 440.

protection for those groups which, because of "widespread, insistent prejudice against them . . . [are] perennial losers in the political struggle."⁶⁰

3. Intermediate Scrutiny

More recently, the Supreme Court has established a middle ground between these two approaches. Under this approach, intermediate or "heightened" scrutiny⁶¹ is applied, and a law will be upheld only if it is "substantially related"⁶² to "important governmental objectives."⁶³ This approach made its debut in *Reed v. Reed*,⁶⁴ and was advanced in *Craig v. Boren*,⁶⁵ where it was applied in a gender-based case.⁶⁶ In *Craig*, the Court stated that *Reed* was "controlling" and applied the standard that "classifications by gender must serve important governmental objectives

⁶⁰ See *TRIBE*, *supra* note 11, § 16-6, at 1454. The development of strict scrutiny for "suspect" classifications was a major step forward in the development of civil rights; it changed the balance of the weight of presumptions. Prior to the recognition of suspect classifications, plaintiffs were required to overcome the burden of the general presumption of legislative validity. The Court's identification of suspect classification shifted the burden to the state to show a compelling interest that mandated upholding the challenged law.

⁶¹ See *NOWAK & ROTUNDA*, *supra* note 5, § 14.3, at 602-05 (generally introducing the topic of intermediate-level review).

⁶² *Equality Found. IV*, 128 F.3d 289, 292 n.1 ("Where legislation singularly and negatively affects a 'quasi-suspect' class (*i.e.*, one defined by gender or illegitimacy), a somewhat less stringent evaluative norm (sometimes called 'intermediate scrutiny') controls whereby such legislative classification is deemed valid if it is 'substantially related to a sufficiently important governmental interest' . . .") (quoting *Cleburne*, 473 U.S. at 440-41).

⁶³ *Id.*

⁶⁴ 404 U.S. 71 (1971) (striking down statute that preferred men over women as estate administrators). In *Reed*, the Court purported to apply rational basis analysis, but rejected the state objectives of "reducing the workload on probate courts" and "avoiding intrafamily controversy." The rejection was not a failure of the rational basis test, rather the objectives were not important enough to justify the gender qualification. See *id.* at 76-77.

⁶⁵ 429 U.S. 190 (1976) (striking down Oklahoma statute that set the drinking age for males at 21 and for females at 18).

⁶⁶ See *id.* at 197-99. The standard has also been applied in illegitimacy cases. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (applying heightened scrutiny to classifications based on illegitimacy); *Trimble v. Gordon*, 430 U.S. 762, 767, 776 (1977) (applying a middle-level review and invalidating a portion of Illinois inheritance statute that prevented illegitimate children from inheriting from their fathers); *Levy v. Louisiana*, 391 U.S. 68, 75-76 (1968) (applying rational basis to strike down Louisiana bar against illegitimate children's standing to sue for wrongful death of their mother); *TRIBE*, *supra* note 11, §16-24, at 1553 (suggesting that although the Court stated it was applying rational basis review in *Levy*, that it was in fact using strict scrutiny).

and must be substantially related to [the] achievement of those objectives."⁶⁷ *Reed* paved the way for decisions invalidating statutes disadvantaging females that were based on out-dated generalizations concerning the proper role for women at home and in the workplace.⁶⁸ In 1996, in *United States v. Virginia*,⁶⁹ the Supreme Court signaled a higher standard within this middle tier, by requiring "exceedingly persuasive" justification⁷⁰ in order to satisfy the "substantially related" prong.

C. Applying Judicial Review

"The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature . . . and it marks the limits of [judicial] authority."⁷¹ Over the years, the Supreme Court found that classifications based on race and national origin⁷² are suspect, that classifications based on illegitimacy⁷³ and gender⁷⁴ are quasi-suspect, and has applied the developed levels of review to uphold or strike down challenged laws.

⁶⁷ *Craig*, 429 U.S. at 197.

⁶⁸ *See id.*; *see also* *Stanton v. Stanton*, 421 U.S. 7, 10 (1975) (holding that the purpose of fostering "old notions" of role typing not sufficient to uphold differential in Utah age-of-majority statute); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (working women); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) ("archaic and overbroad" generalizations); *Frontiero v. Richardson*, 411 U.S. 677, 689 n.23 (1973) (servicewomen).

⁶⁹ *See United States v. Virginia*, 518 U.S. 515, 519 (1996) (rejecting Virginia's bid to maintain Virginia Military Institute, VMI, as an all-male institution).

⁷⁰ *Id.* at 533 (noting that gender-based classifications "must not rely on overbroad generalizations about the different . . . capacities . . . of males and females"); *see also* Christina Gleason, Comment, *United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 807 (1996) (discussing the exceedingly persuasive justification requirement in gender discrimination cases, suggesting a tougher standard within the intermediate level of review).

⁷¹ *Romer v. Evans*, 517 U.S. 620, 632 (1996).

⁷² *See supra* note 43 (discussing "suspect classifications," particularly those based on race or national origin).

⁷³ *See Clark v. Jeter*, 486 U.S. 456, 461-63 (1988) (applying heightened scrutiny to classifications based on illegitimacy); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (applying middle-level review and invalidating a portion of Illinois inheritance statute that prevented illegitimate children from inheriting from their fathers); *Levy v. Louisiana*, 391 U.S. 68 (1968) (applying rational basis to strike down Louisiana bar against illegitimate children's standing to sue for wrongful death of their mother).

⁷⁴ *See supra* notes 61-70 and accompanying text (discussing application of intermediate-level review to gender-based cases).

D. Gays and the Fourteenth Amendment

The Supreme Court, however, has thus far declined to acknowledge that homosexuals as a group merit any level of protected status.⁷⁵ As will be discussed below, *Bowers v. Hardwick*⁷⁶ established a conduct-based justification for upholding an anti-sodomy law that “stands as the cornerstone—or stumbling block—of all current attempts to gain Fourteenth Amendment protections for homosexuals.”⁷⁷ Post-*Hardwick*, the circuit courts deciding the issue of whether sexual orientation is a suspect or quasi-suspect classification have decided that it is neither; they have followed *Hardwick*’s focus on homosexual conduct rather than homosexuality as a status.⁷⁸

1. Homosexual Conduct

In *Bowers v. Hardwick*,⁷⁹ decided in 1986, the Supreme Court, in a five to four decision,⁸⁰ held that a Georgia statute

⁷⁵ See NOWAK & ROTUNDA, *supra* note 5, § 14.3, at 601; see also John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375, 375 (1990) (explaining that the courts have “rebuffed attempts by homosexuals to seek redress through statutory and constitutional claims”).

⁷⁶ 478 U.S. 186 (1986).

⁷⁷ Wayne Biggs, Casenote, *Hitting the Home Run or Wishful Thinking: Cincinnati’s Issue Three and the Significance of Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 5 GEO. MASON U. CIV. RTS. L.J. 223 (1995) (commenting on the district court decision in *Equality Found. II*). For a history of gay-rights cases leading up to and following *Hardwick*, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). See also Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 NEB. L. REV. 723 (1993); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (a pre-*Hardwick* call for equal protection for homosexuals).

⁷⁸ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571–72 n.6, 573–74 (9th Cir. 1990) (stating that homosexuality is behavioral); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding homosexuals not suspect or quasi-suspect because homosexuality is “primarily behavioral in nature”); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464–65 (7th Cir. 1989) (holding that if homosexual conduct may be criminalized, then homosexuals do not constitute suspect or quasi-suspect classification); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (holding that *Hardwick* is an “insurmountable barrier[]” to giving quasi-suspect classification to gays).

⁷⁹ 478 U.S. 186 (1986).

⁸⁰ See *id.* Justice White wrote the Court’s opinion, joined by Chief Justice Burger, and Justices Powell, Rehnquist, and O’Connor. See *id.* at 187. Chief Justice Burger and Justice Powell also each filed concurring opinions. See *id.* at 196 (Burger) and 197 (Powell). Justice Blackmun dissented, joined by Justices Brennan,

criminalizing consensual sodomy was constitutional.⁸¹ Justice White framed the issue as "whether the . . . Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal . . .".⁸² The Court reversed the Eleventh Circuit,⁸³ which had held that the Georgia anti-sodomy statute interfered with the fundamental due process right to make "certain individual decisions critical to personal autonomy [that] are essentially private and beyond the legitimate reach of a civilized society."⁸⁴ The Court stated that its earlier decisions in the areas of child-rearing and education,⁸⁵ procreation,⁸⁶ and family relationships⁸⁷ bore no "resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy"⁸⁸ and that there was "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . .".⁸⁹ Following the Court's earlier standards articulated in *Palko v. Connecticut*⁹⁰ and *Moore v. City of East Cleveland*,⁹¹ the Court declined to expand the right of privacy to encompass homosexual conduct because "to claim that a right to engage in such conduct

Marshall, and Stevens. See *id.* at 199. Justice Stevens also filed a separate dissent, in which he was joined by Justices Brennan and Marshall. See *id.* at 214.

⁸¹ See *id.* at 187-96.

⁸² *Id.* at 190.

⁸³ See *id.* at 196 (reversing the Eleventh Circuit's decision).

⁸⁴ *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985).

⁸⁵ See *Hardwick*, 478 U.S. at 190; see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same).

⁸⁶ See *Hardwick*, 478 U.S. at 190; see also *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (procreation); *Bellotti v. Baird*, 443 U.S. 622 (1979) (procreation); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (child-bearing); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation).

⁸⁷ See *Hardwick*, 478 U.S. at 190; see also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (family relationships); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (same).

⁸⁸ *Hardwick*, 478 U.S. at 190-91.

⁸⁹ *Id.* at 191.

⁹⁰ 302 U.S. 319, 325-26 (1937) (defining fundamental liberties as those that are "implicit in the concept of ordered liberty . . . [such that] neither liberty nor justice would exist if they were sacrificed").

⁹¹ 431 U.S. at 503 (defining fundamental liberties as those that are "deeply rooted in this Nation's history and tradition").

is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."⁹²

After finding that earlier precedent provided no foundation for a finding that a fundamental right to engage in homosexual conduct existed, the Court further cautioned against "discover[ing] new fundamental rights."⁹³ "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."⁹⁴ Therefore, there should be "great resistance to expand the substantive reach" of the Fifth and Fourteenth Amendments.⁹⁵

In his dissent, Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, disagreed with the majority's view that the case was about whether there is a fundamental right to engage in homosexual conduct.⁹⁶ Rather, they saw the issue as one of privacy, " 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' "⁹⁷ Justice Blackmun would have held that the Constitution guarantees individuals a privacy right to "decide for themselves whether to engage in particular forms of private, consensual sexual activity."⁹⁸ Justice Blackmun felt the traditional areas of privacy—marriage, family, and procreation—are protected "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of

⁹² *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (quoting *Palko* and *Moore*). One of the main problems with the point of view that only those rights "deeply rooted in this Nation's history and tradition" is that when the nation was founded, African Americans were kept in slavery, and women did not get the right to vote in national elections until 1920, and yet the law and society have advanced to offer protections to both African Americans and women. See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). Past inequities cannot justify perpetuating policies violative of constitutional protections as we come to understand them.

⁹³ *Hardwick*, 478 U.S. at 194.

⁹⁴ *Id.*

⁹⁵ *Id.* at 195.

⁹⁶ See *id.* at 199 (Blackmun, J., dissenting).

⁹⁷ See *id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

⁹⁸ *Id.* ("I believe we must analyze Respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy.").

an individual's life."⁹⁹ In Justice Blackmun's view, a person's sexual life is so central that the right to privacy includes the right to consensual sex.¹⁰⁰ Justice Blackmun went on to say, "individuals define themselves in a significant way through their intimate sexual relationships"¹⁰¹ and that, therefore, these relationships fit within established privacy protections.¹⁰² In his view, the majority's focus on homosexuality in construing the challenged Georgia statute was misguided.¹⁰³ Justice Blackmun concluded that since the language of the statute prohibited certain sexual conduct regardless of whether the participants were heterosexual or same-sex partners,¹⁰⁴ the "sex or status of the persons who engage in the act is irrelevant as a matter of state law."¹⁰⁵ This is a key point, as *Hardwick* was decided on conduct-based due process grounds,¹⁰⁶ yet its progeny,¹⁰⁷ including *Equality Foundation*,¹⁰⁸ found *Hardwick* a bar to finding in favor of homosexuals on status-based equal protection claims.

⁹⁹ *Id.* at 204.

¹⁰⁰ *See id.* at 205.

¹⁰¹ *Id.*

¹⁰² *See id.* "[T]he Court's conclusion that [privacy protections] extend no further than this boundary [of family] ignores the warning . . . against 'clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause.'" *Id.* at 204 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977)).

¹⁰³ *See id.* at 200 (Blackmun, J., dissenting).

¹⁰⁴ *See* GA. CODE ANN. § 16-6-2(a) (Michie 1996) (defining the criminal defenses of sodomy and aggravated sodomy); *see also Hardwick*, 478 U.S. at 200 ("[T]o the extent I can discern a legislative purpose for [the] . . . enactment of [the statute], that purpose seems to have been to . . . reach heterosexual as well as homosexual activity") (Blackmun, J., dissenting). It is interesting to note that recently, in *Powell v. State*, the Supreme Court of Georgia overturned that provision of the Georgia Code, as violative of the state constitution. *See Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

¹⁰⁵ *Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting). Although the dissent made the point that the challenged statute was not gender-specific, Justice Blackmun would have found a fundamental liberty in the conduct itself. *See id.* at 208 (Blackmun, J., dissenting).

¹⁰⁶ *See id.* at 196 (opinion of the Court).

¹⁰⁷ *See supra* note 78 and accompanying text (discussing cases defining homosexuality as conduct rather than status).

¹⁰⁸ *Equality Found. IV*, 128 F.3d 289, 293 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998) (stating that "homosexuals d[o] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which define[s] them as homosexuals [i]s constitutionally proscribable") (citing *Equality Found. III*, 54 F.3d 261, 266-67 & n.2 (6th Cir. 1995)).

2. Homosexuality as a Status

Ten years after *Hardwick*, in *Romer v. Evans*,¹⁰⁹ the Court struck down a Colorado state constitutional amendment ("Amendment 2" or "Colorado Amendment")¹¹⁰ that prevented the state or any local government from passing legislation designed to grant protected status and prohibit discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."¹¹¹ Amendment 2 was challenged in Colorado state court,¹¹² and ultimately, in the Colorado Supreme Court. Colorado's Supreme Court held that Amendment 2, which made amendment of the state constitution an obstacle to passage of any future gay-rights legislation,¹¹³ "infringed [upon] the fundamental rights of gays and lesbians to participate in the political process."¹¹⁴ Holding that participation in the political process

¹⁰⁹ 517 U.S. 620 (1996).

¹¹⁰ See *Evans*, 517 U.S. at 623. The text of the Amendment is as follows: No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624 (quoting COLO. CONST. art. II, § 30b).

¹¹¹ *Evans*, 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30b, passed by the state's voters as "Amendment 2"). As Justice Kennedy, writing for the majority, explains, Amendment 2 was adopted in a 1992 statewide voter referendum. See *id.* at 623. The Colorado Amendment was prompted by several municipal ordinances that prohibited discrimination in housing, employment, and public accommodation, and included protections against anti-gay discrimination, along with the more traditionally accepted status-based groups, such as race, national origin, and gender. See *id.* at 623-24 (citing DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-91-28-116 (1991); BOULDER, COLO., REV. CODE §§ 12-1-1-12-1-11 (1987); ASPEN, COLO., REV. CODE § 13-98 (1977)). The local ordinances defined "sexual orientation" in terms of status, as opposed to conduct. See *Evans*, 517 U.S. at 624 (noting that the Boulder Code defined "sexual orientation" in terms of choice of sexual partners) (quoting BOULDER REV. CODE § 12-1-1); see also *id.* (explaining that the Denver Code defined "sexual orientation" in terms of the "status of an individual as to his or her heterosexuality, homosexuality or bisexuality") (quoting DENVER, COLO., REV. MUN. CODE art. IV, § 28-92).

¹¹² See *Evans*, 517 U.S. at 625.

¹¹³ See *id.* at 631 (noting that homosexuals "can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution").

constituted a fundamental right, the Colorado court applied strict scrutiny and struck down Amendment 2.¹¹⁵

The United States Supreme Court affirmed the judgment, but did not adopt the rationale of the Colorado court.¹¹⁶ The Court disagreed with the Colorado court's finding that Amendment 2 affected any fundamental right, because the right to participate in the political process is not a fundamental constitutional right.¹¹⁷ Instead, the Court examined Amendment 2 using traditional rational basis analysis,¹¹⁸ and found that the Amendment both impermissibly singled out an unpopular group for discrimination based on animosity¹¹⁹ and was too tenuously connected to any legitimate state purpose.¹²⁰ The Court soundly rejected Colorado's argument that Amendment 2 merely "puts gays and lesbians in the same position as all other persons," and that it "does no more than deny homosexuals special rights."¹²¹

¹¹⁴ *Id.* at 625; see also *Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) (hereinafter *Evans I*) (holding that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny").

¹¹⁵ See *Evans I*, 854 P.2d at 1286.

¹¹⁶ See *Evans*, 517 U.S. at 626. The decision was six to three. Justice Kennedy delivered the opinion of the Court, joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Thomas.

¹¹⁷ See *id.* (relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Justice Scalia noted:

The Court evidently agrees that "rational basis"—the normal test for compliance with the Equal Protection Clause—is the governing standard. . . . And the Court implicitly rejects the Supreme Court of Colorado's holding . . . that Amendment 2 infringes upon a "fundamental right" of "independently identifiable class[es]" to "participate equally in the political process."

Id. at 640 n.1 (Scalia, J., dissenting).

¹¹⁸ See *id.* at 631-35; see also *supra* notes 51-55 and accompanying text (discussing rational basis analysis). The two bases for finding a law invalid under the rational basis standard are that it is motivated by an illegitimate state purpose, or that it is too far removed from any legitimate one. See *supra* note 55.

¹¹⁹ See *Evans*, 517 U.S. at 632. "Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation." *Id.*

¹²⁰ See *id.* "[The amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.*

¹²¹ *Id.* at 626.

In the Court's reading, these so-called "special rights" are merely the "safeguards that others enjoy or may seek without constraint,"¹²² such as protection against discrimination in public accommodations, licensing, and employment.¹²³ The Colorado Amendment barred any governmental unit in the state from providing any protection against discriminatory actions based on anti-gay bias, an obstacle imposed only on those of homosexual status.¹²⁴ Amendment 2 was a "status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests."¹²⁵

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, relying on three main premises.¹²⁶ First, that *Bowers v. Hardwick*¹²⁷ controls the arena and contradicts the majority's "holding that homosexuality cannot be singled out for disfavorable treatment."¹²⁸ Justice Scalia reasoned that if it is permissible to criminalize conduct, then it is also acceptable to make laws that discriminate against those who engage in that conduct.¹²⁹ Second, the dissent found that "Amendment 2 does not deprive homosexuals of the 'protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings,' "¹³⁰ and therefore they are not deprived of the same protections the rest of us have.¹³¹ Finally,

¹²² *Id.* at 631.

¹²³ *See id.* at 629.

¹²⁴ *See id.* at 629-30.

¹²⁵ *Id.* at 635.

¹²⁶ *See id.* at 636-40.

¹²⁷ 478 U.S. 186 (1986); *see also supra* notes 79-108 and accompanying text (discussing the *Hardwick* Court's view of homosexuality as conduct, which can be controlled through legislation, rather than as a classification, falling under the Equal Protection Clause of the Fourteenth Amendment).

¹²⁸ *Evans*, 517 U.S. at 636 (Scalia, J., dissenting).

¹²⁹ *See id.* at 641.

¹³⁰ *Id.* at 637 (quoting *Evans*, 517 U.S. at 630 (opinion of the Court)).

¹³¹ *See id.* at 637-38. Justice Scalia seems to blithely suggest that if a gay person is denied a job or an apartment because he or she is gay, and if he or she happens to belong to another group protected by local human rights ordinances in Colorado, that he or she has the same recourse as any other Coloradan. *See id.* ("[G]eneral laws and policies that prohibit arbitrary discrimination would continue to prohibit discrimination on the basis of homosexual conduct as well.") (internal quotations omitted). The majority pointed out, however, that if a homosexual person were to bring a claim under a Colorado law prohibiting arbitrary discrimination: an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexual-

persisting in seeing homosexuality solely in terms of sexual conduct, Justice Scalia found that Amendment 2 met the rational basis requirement.¹³²

II: *EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. V. CITY OF CINCINNATI*

A. *The Cincinnati Voter Referendum*

In 1991 and 1992, respectively, the Cincinnati City Council enacted the Equal Employment Opportunity Ordinance ("EEO")¹³³ and the Human Rights Ordinance ("HRO").¹³⁴ Opposing the protection given to gays under the two ordinances, a group known as Equal Rights Not Special Rights ("ERNSR")¹³⁵ started a campaign to amend the Charter of the City of Cincinnati to disallow the portions of the ordinances directed against

ity, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

Id. at 630.

¹³² See *id.* at 640-43. Justice Scalia would also deny the claim because it is a facial challenge, and in his view the plaintiffs have not met their burden for that challenge. Facial challenges are the most difficult to prove. See *id.* at 643. When a law is challenged "on its face," a plaintiff must prove that there is no conceivable string of circumstances where it might, however improbably, be valid. See *id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When a law is challenged "as applied," the plaintiff must establish not that the law can never be applied in any valid way, as in the facial challenge; rather, he or she must show that the law has been applied in an unconstitutional fashion. See *id.*

¹³³ See *Equality Found. II*, 860 F. Supp. 417, 421 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997) (citing CINCINNATI, OHIO, CITY ORDINANCE No. 79-1991). The EEO prohibited discrimination in city employment and appointments to city boards and commissions, based on sexual orientation, race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. See *id.*

¹³⁴ See *id.* The HRO, as originally enacted, prohibited discrimination in "private employment, public accommodations and housing." *Id.* at 421. The HRO details the same list as does the EEO of discrete groups or defining traits that shall not be discriminated against: sexual orientation, race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. See *id.* The HRO also has a severability clause, providing that it is the "controlling legislative intent that if any provisions of [the HRO], or the application thereof . . . is held to be invalid, the remaining sections . . . shall not be affected thereby . . ." *Id.* at 421 n.3. The words "sexual orientation" were deleted from the HRO by the City Council on March 8, 1995, after Issue 3 was passed. See *Equality Found. III*, 54 F.3d 261, 271 (6th Cir. 1995).

¹³⁵ See *Equality Found. II*, 860 F. Supp. at 422.

anti-gay discrimination.¹³⁶ ERNSR was successful, and Issue 3, appending Article XII to the City Charter, was placed on the November 1993 ballot.¹³⁷ The Amendment had the effect of precluding the City Council from making any future ordinances that afforded gays "protected status" or "preferential treatment."¹³⁸ ERNSR's campaign for Issue 3 rested largely on the idea that gays should not be granted "special rights."¹³⁹ The campaign was hotly contested by, among others, the Equality Foundation of Greater Cincinnati, Inc. ("Equality Foundation").¹⁴⁰ After a "bitter and often inflammatory campaign," the measure was passed on November 2, 1993.¹⁴¹ Equality Foundation challenged Issue 3 in federal district court¹⁴² under 42 U.S.C. § 1983,¹⁴³ challenging

¹³⁶ See *id.* "The Charter of the City of Cincinnati is akin to a local constitution. . . . Generally, local laws must comply with the Charter." Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 838 F. Supp. 1235, 1236 (S.D. Ohio 1993) (granting preliminary injunction) (hereinafter *Equality Found. I*). Amending the City Charter is "a burdensome task that requires a city wide campaign and support of a majority of the voters; a far more onerous task than lobbying the City Council or City administration . . ." *Id.* at 1237.

¹³⁷ See *Equality Found. II*, 860 F. Supp. at 422. Issue 3 provides in full:
ARTICLE XII NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Id.

The last paragraph not-too-subtly refers to the EEO and to the HRO. The Amendment, because it is self-executing, has the effect of repealing two ordinances, duly enacted by the Cincinnati City Council, without a public hearing or any formality at all.

¹³⁸ *Id.*

¹³⁹ *Id.*; see also *supra* note 121 and accompanying text (noting "special rights" issue in *Romer v. Evans*).

¹⁴⁰ See *Equity Found. II*, 860 F. Supp. at 422. It seems that there was hyperbole and outright misinformation on both sides of the issue: ERNSR ran ads associating homosexuals with pedophiles, and characterizing homosexuality as "simply a matter of 'who one chooses to have sex with' . . ." *Id.* (referring to Plaintiffs' Exhibits 2 and 27). Equality Foundation, for its part, bought "notorious . . . ubiquitous 'Hitler-KKK-McCarthy' [sic] billboards." *Id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ 42 U.S.C. § 1983 (Supp. I. 1996). The text of the statute is as follows:

the constitutionality of Issue 3. Equality Foundation argued that gays, lesbians, and bisexuals should be "classified as a suspect or quasi-suspect class," and therefore entitled to strict scrutiny;¹⁴⁴ that even under the less stringent rational basis level of review, Issue 3 violated the Due Process Clause;¹⁴⁵ that Issue 3 violated the plaintiffs' fundamental rights, under the First Amendment,¹⁴⁶ to "free speech and association and to petition the government for a redress of grievances";¹⁴⁷ and that Issue 3 violated the plaintiffs' "Fundamental Right to equal participation in the political process."¹⁴⁸ Equality Foundation also sought a preliminary injunction barring enforcement of Issue 3, which was granted by the Southern District of Ohio.¹⁴⁹

B. The District Court Decisions (Equality Foundation I and II)

The district court, in a sensitive¹⁵⁰ and thoughtful opinion, "expressly reject[ed] the notion that homosexual orientation is

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

¹⁴⁴ See *Equality Found. II*, 860 F. Supp. 417, 434 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997).

¹⁴⁵ See *id.* at 440. The Due Process Clause of the Fourteenth Amendment states: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹⁴⁶ See *Equality Found. II*, 860 F. Supp. at 429. The First Amendment of the Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

¹⁴⁷ *Equality Found. II*, 860 F. Supp. at 429.

¹⁴⁸ *Id.* at 430.

¹⁴⁹ See *Equality Found. I*, 838 F. Supp. 1235 (S.D. Ohio 1993) (granting preliminary injunction).

¹⁵⁰ See *Equality Found. II*, 860 F. Supp. at 421. The court was diplomatic in invalidating the Charter Amendment in stating that the "decision represents the culmination of at least one phase of an emotional, highly controversial and hotly contested law suit." *Id.* at 420. Further, the court said that "[b]oth sides have been represented by extremely competent and thoroughly prepared attorneys who presented their respective cases forcefully and persuasively." *Id.* at 420-21.

'defined by' any conduct"¹⁵¹ The court acknowledged that the consensus among the various circuits of the United States Court of Appeals was that gays do not constitute a quasi-suspect class.¹⁵² The court found a distinction between volitional conduct and immutable status.¹⁵³ The court stated that the line of cases denying gays quasi-suspect classification were all based on homosexuality as a conduct, rather than homosexuality as a status.¹⁵⁴ The court held, first, that gays meet the criteria for quasi-suspect class, and therefore the challenged state action must meet heightened scrutiny;¹⁵⁵ second, that Issue 3 did not even pass a rational basis analysis;¹⁵⁶ third, that the Amendment

¹⁵¹ *Id.* at 440.

¹⁵² *See id.* at 439.

¹⁵³ *See id.*

¹⁵⁴ *See id.* But see *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (conduct); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571-72 n.6, 573-74 (9th Cir. 1990) (stating that homosexuality is behavioral); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (holding that if homosexual conduct may be criminalized, "then homosexuals do not constitute a suspect or quasi-suspect class"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding homosexuals not a suspect or quasi-suspect class because homosexuality is "primarily behavioral in nature"); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (holding that *Hardwick* is an "insurmountable barrier[]" to giving quasi-suspect classification to gays).

¹⁵⁵ *See Equality Found. II*, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997). The court defined factors to be considered in determining whether a group constitutes a quasi-suspect class. *See id.* These factors are:

- (1) whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society;
- (2) whether the members of the group have any control over their sexual orientation;
- (3) whether sexual orientation is an immutable characteristic;
- (4) whether that group has suffered a history of discrimination based on their sexual orientation; and
- (5) whether the class is "politically powerless."

Id.

¹⁵⁶ *See id.* at 440. The court found that, "although a classification must be upheld under the rational basis standard if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, 'even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.'" *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). The presumption of legitimacy is a strong one, and most laws analyzed under this standard will be upheld. However, "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (citations omitted). " '[M]ere negative attitudes, or fear,' of a given group, will not suffice as a legitimate governmental purpose." *Equality Found. II*, 860 F. Supp. at 440 (quoting *Cleburne*, 473 U.S. at 439). The court noted that private biases are outside the law's jurisdiction, yet "the law 'cannot, directly or indirectly, give them effect.'" *Id.* at 441 (quoting *Palmore v. Si-*

to the City Charter was unconstitutionally vague, therefore violating due process;¹⁵⁷ and finally, that Issue 3 had a deterrent effect on the fundamental rights to free speech and equal access to the political process, requiring that the law must meet strict scrutiny review.¹⁵⁸ The court stated that "any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates their fundamental rights."¹⁵⁹

This argument goes too far. It essentially says that if one can identify any distinct group and demonstrate that a law makes it more difficult for that group to pass legislation, then that law will impinge a fundamental right and require strict scrutiny. This thinking could render moot the distinction be-

doti, 466 U.S. 429, 433 (1984)). The court found the proposed legitimate state purposes justifying the Amendment unconvincing. *See id.*

¹⁵⁷ *See id.* at 447-48. The court found that evidence that there was "[c]onfusion surrounding Issue 3's scope and impact was abundant at trial and otherwise on the record." *Id.* at 448. "In fact, the Defendants' own witnesses offered differing views regarding Issue 3's scope." *Id.* This is exactly the sort of evil the void-for-vagueness doctrine is designed to prevent. Legislation must not be broader than necessary to fulfill its objectives, and it must be sufficiently clear so that it can be even-handedly applied. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also* *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251-52 (6th Cir. 1994) (discussing the applicable standard to determine if a statute is unconstitutionally vague); *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1399 (6th Cir. 1987) (holding an ordinance which provided for the disposal of fetal remains in a manner as proscribed by the health commission vague for failure to provide sufficient warning to potential violators); *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (explaining that "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment). Vague laws are offensive, first, because they "may trap the innocent by not providing fair warning" and second, because laws must "provide explicit standards for those who apply them" in order to prevent arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at 108. Laws, in general, must not be too broad or too vague, but when a fundamental right is at issue, a vague law operates to have a chilling effect on the exercise of that right. *See id.* at 109.

The court found that "[o]n its very face, Issue 3 lends itself to contradictory interpretations." *Equality Found. II*, 860 F. Supp. at 448. Due to the law's ambiguities, persons will "steer clear of . . . lawful conduct . . . [and] have a more restrictive life imposed upon them than the law requires . . ." *Id.* at 449. The court concluded that Issue 3, which has the potential for criminal penalties, does not give fair warning. *See id.* Additionally, Issue 3's vagueness could lead to discriminatory enforcement. *See id.*

¹⁵⁸ *See id.* at 430 (holding that "Issue 3 violates the Plaintiffs' Fundamental Right to Equal access to the political process").

¹⁵⁹ *Id.* (citing *Equality Found. I*, 838 F. Supp. 1235, 1238-42 (S.D. Ohio 1993)).

tween intermediate and strict level scrutinies, and require strict scrutiny for just about any equal protection challenge.¹⁶⁰

The *Equality Foundation II* court found that Issue 3, by requiring a charter amendment be passed before any future City Council ordinances giving protected status or preferential treatment to gays, placed an "added and virtually insurmountable burden" in the way of future gay rights legislation in Cincinnati, and that as such, it denied gay Cincinnatians their fundamental right to equal participation in the political process.¹⁶¹

Further, the court found that since the Amendment eliminated any protection for gays, that campaigning in favor of a charter amendment as a first step toward establishing that protection would "expose [gays] to discrimination for which they will have no recourse . . . to obtain protection, thereby increasing the risks of, and consequently chilling, such expression."¹⁶² The district court granted a permanent injunction barring the enforcement of Issue 3,¹⁶³ and the City appealed.

C. The First Sixth Circuit Decision (*Equality Foundation III*)

On appeal, the Sixth Circuit reversed.¹⁶⁴ First, the court found that *Bowers v. Hardwick*¹⁶⁵ "command[s] that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.'"¹⁶⁶ Second, it held that no

¹⁶⁰ See *id.* at 430 (summarizing Cincinnati's argument that if this thinking were followed, it would mean that "no issue could be relegated to the charter amendment process" because the proponents of any amendment are an "identifiable group").

¹⁶¹ *Id.* at 433.

¹⁶² *Equality Found. I*, 838 F. Supp. at 1242 (granting preliminary injunction); see also *Equality Found. II*, 860 F. Supp. 417, 445 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997) (affirming its earlier decision).

¹⁶³ See *Equality Found. II*, 860 F. Supp. at 449.

¹⁶⁴ See *Equality Found. III*, 54 F.3d 261, 271 (6th Cir. 1995).

¹⁶⁵ 478 U.S. 186 (1986).

¹⁶⁶ *Equality Found. III*, 54 F.3d at 268. The court stated that "[s]ince *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected." *Id.* at 266. The Sixth Circuit was convinced that homosexuality was and should continue to be defined by conduct. See *id.* at 267; see also *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) (characterizing homosexuality as status defined by conduct); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuals may not expect equal protection because their identifying conduct may be constitutionally criminalized); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (stating that homosexuality is primarily behavioral and therefore subject to change, rather than

fundamental right was affected by the Amendment.¹⁶⁷ Concluding, therefore, that rational basis was the proper level of review,¹⁶⁸ the court held that Issue 3 survived rational basis analy-

being an immutable status, and stating that after *Hardwick* there is no constitutional impediment to discrimination against gays); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (holding that since homosexual conduct may be criminalized those with homosexual status may not expect equal protection); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (categorizing homosexuality as status-based).

The court stated that "[t]hose persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class." *Equality Found. III*, 54 F.3d at 267. In fact, the court said, "[m]any homosexuals successfully conceal their orientation." *Id.* This is fatuous reasoning: the court ignores that the reason many gay Americans may stay "in the closet" is to avoid discrimination they might be subject to if they were "out." An interesting comparison could be drawn to the days of Jim Crow, when light-skinned African Americans "passed" as white so that they could enjoy the full range of civil rights. Furthermore, the court argued that even if the focus were on homosexuality as status, rather than homosexual conduct, the Amendment passes constitutional equal protection scrutiny because "it imposes no punishment or disability upon persons belonging to that group but rather merely removes previously legislated special protection . . ." *Id.* at 267 n.4. This is the same argument the Supreme Court rejected as "implausible" in *Romer v. Evans*, 517 U.S. 620, 625 (1996).

¹⁶⁷ See *Equality Found III*, 54 F.3d at 269. The court compared other cases involving voter-approved amendments and concluded that those cases rose or fell based on whether the amendments affected a suspect or quasi-suspect class or persons, not on whether requiring a majority approval impacted any fundamental right to participate in the political process. See *id.* Compare *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-87 (1982) (invalidating a voter-approved initiative designed to prevent bussing of schoolchildren for the purpose of racial integration) and *Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969) (applying strict scrutiny to invalidate a voter-approved amendment to a city charter forbidding the city council to legislate on race-based prohibition against discrimination in private housing without the prior approval of a majority of the voters) with *James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (holding that, although the voter-approved amendment imposed the same procedural impediment as *Hunter*, that the requirement of a majority vote before an action was taken would not invalidate the amendment because it was neutral on its face and no fundamental right to participation in the political process was found).

The court concluded that the Amendment did not "impair homosexuals and other interested parties from seeking to repeal the Amendment . . ." *Equality Found. III*, 54 F. Supp. at 269. Also, that it "deprived no one of the right to vote, nor did it reduce the relative weight of any person's vote." *Id.* The court found *Equality Foundation's* arguments that the Amendment had a chilling effect on political speech unavailing. See *id.* The court stated that the First Amendment "prohibits only governmental burdens upon speech" and "does not command the government to insulate any person from the effects of private action resulting from the exercise of free speech or association rights." *Id.* It found that protection against discrimination in private employment potentially resulting from bias against homosexuals was not mandated by the Constitution. See *id.* at 269-70.

¹⁶⁸ See *id.* at 270. As discussed *supra* notes 51-55 and accompanying text, rational basis analysis is applied where there is no suspect or quasi-suspect classification impacted and when there is no fundamental right burdened. See *Equality*

sis.¹⁶⁹ Further, the court was unconvinced by the void-for-vagueness finding of the lower court.¹⁷⁰ Thus, the Sixth Circuit reversed, and vacated the injunction.¹⁷¹

Equality Foundation petitioned the United States Supreme Court for certiorari, which was granted on June 17, 1996.¹⁷² The Supreme Court, however, having decided *Romer v. Evans*¹⁷³ less

Found. III, 54 F.3d at 270. Under rational basis review, the challenged legislation must stand unless there is no conceivable basis connecting the legislation to a legitimate state interest, "regardless of whether or not such supporting rationale was . . . actually relied upon by the promulgating authority." *Id.* "Indeed, in the referendum context, it is impermissible for the reviewing court to inquire into the possible actual motivations of the electorate in adopting the proposal." *Id.* at 270 n.9; see also *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994) (noting policy considerations in limiting a court's examination of the factors motivating the electorate in a referendum); *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) (reiterating the impermissibility of inquiring into the motivation of voters).

¹⁶⁹ See *Equality Found. III*, 54 F.3d at 270. The court was convinced by the City's arguments suggesting legitimate state interests rationally related to the Amendment. See *id.* (stating that the City presented a "litany of valid community interests," including that of "encourag[ing] enhanced associational liberty on the part of Cincinnati residents . . . by eliminating exposure to the punishment mandated by the Human Rights Ordinance against certain persons who elected to disassociate themselves from homosexuals").

This argument, that associational liberty is enhanced by permitting one group of persons to prevent another group, based on their status, from free association in the community, seems to employ Orwellian Newspeak. See generally GEORGE ORWELL, NINETEEN EIGHTY-FOUR 5 (1949) ("War is peace. Freedom is slavery. Ignorance is strength."); see *id.* at 215 ("*Doublethink* means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them."). It also sounds like the Vietnam-era maxim, "It became necessary to destroy the town in order to save it." Anonymous, BARTLETT'S FAMILIAR QUOTATIONS, 784 ¶ 6 (Justin Kaplin ed., 16th ed. 1992) (attributing remark to American officer outside Ben Tre, Vietnam) (from N.Y. TIMES, Feb. 8, 1968).

¹⁷⁰ See *Equality Found. III*, 54 F.3d 261, 271 (6th Cir. 1995). The Sixth Circuit found that the argument that Issue 3 was vague was unripe, since the plaintiff had "suffered no actual or imminent injury by the implementation of the Amendment" but "merely asserted an abstract hypothetical scenario and conjectured that it was unable to determine if the employment of a homosexual, lesbian, or bisexual because of his or her sexual orientation would be civilly or criminally actionable under the Human Rights Ordinance as anti-heterosexual discrimination." *Id.* The court further stated that the "vagueness issue has been rendered moot by Council's March 8, 1995 amendment to the Human Rights Ordinance . . . which struck all references to 'sexual orientation' from the legislation." *Id.* For the original text of the HRO, see *supra* note 134. The court again uses faulty logic. The deletion of the words "sexual orientation" was surely motivated by Issue 3. If Issue 3 is unconstitutional, then the deletion was unnecessary.

¹⁷¹ See *Equality Found. III*, 54 F.3d at 271.

¹⁷² See 518 U.S. 1001 (1996) (mem.) (Rehnquist, CJ. and Scalia and Thomas, JJ., dissenting from decision to remand).

¹⁷³ 517 U.S. 620 (1996).

than a month earlier, on May 20, 1996, vacated the judgment of the Sixth Circuit and remanded the case "for further consideration in light of *Romer v. Evans*."¹⁷⁴

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the denial of certiorari.¹⁷⁵ The dissenting justices saw a distinction between *Evans* and *Equality Foundation* that they felt made reconsideration unnecessary. Justice Scalia said that *Evans* involved a "constitutional amendment prohibiting special protection for homosexuals . . . [while t]he present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection."¹⁷⁶ He stated that the "consequence of holding this provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals."¹⁷⁷ Justice Scalia saw this distinction between state constitution and local city charter amendments as an "ultra-*Romer*" issue, which he suggested might be appropriate for the Court to decide.¹⁷⁸

It seems that the distinction between *Evans* and *Equality Foundation* asserted by Justice Scalia is the axiomatic "distinction without a difference." He appears to be saying that what is unconstitutional at the state level is permitted at the local level. This is contrary to general constitutional principles, which allow states to provide broader protections for their citizens than the Federal Constitution provides, but that the reverse is, of course, not true.¹⁷⁹ If a state constitutional amendment prohibiting "special protection" to gays is unconstitutional, it only seems logical

¹⁷⁴ *Equality Found.*, 518 U.S. at 1001.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (stating that a state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); NOWAK & ROTUNDA, *supra* note 5, § 14.30, at 853 n.31 ("State supreme courts have the authority to grant greater degrees of individual liberties than are required by the United States Constitution; if the grant of additional freedom . . . is based upon state rather than federal law, the Supreme Court should not overrule the state court decision."); *see also Bluefield Community Hosp., Inc. v. Anziulewicz*, 737 F.2d 405, 409 (4th Cir. 1984) (agreeing with the premise that a state constitution may grant a higher level of protection than the federal constitution).

that a city charter amendment prohibiting "special protection" to gays should also be constitutionally unacceptable.

D. On Remand to the Sixth Circuit (Equality Foundation IV)

The Sixth Circuit on remand adhered to its earlier decision.¹⁸⁰ The court applied the rational basis test, as did the Supreme Court in *Evans*, and concluded that the Cincinnati Charter Amendment was rationally related to a legitimate government purpose.¹⁸¹ The court then compared *Evans's* Amendment 2 to *Equality Foundation's* Issue 3, and distinguished the two, largely on the ground that the action in Cincinnati, on a municipal level, was not as serious a potential disadvantage as Colorado's enactment, which affected the entire state.¹⁸² The Sixth Circuit ultimately concluded that, in contrast to Colorado's Amendment 2, Cincinnati's Issue 3 survived rational basis analysis, followed its earlier decision, and upheld the Charter Amendment.¹⁸³ The Sixth Circuit also later rejected a petition for a rehearing en banc,¹⁸⁴ and distinguished *Evans*, stating, "[e]ven the staunchest proponents of the Supreme Court's decision in *Romer v. Evans*, readily admit that the Court in that case purposely crafted a narrow opinion focused on the precise factual situation presented by Colorado's Amendment 2."¹⁸⁵ A dissent, however, was filed¹⁸⁶ in which five judges of the Sixth Circuit stated that they believed that the panel decision in

¹⁸⁰ See *Equality Found. IV*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

¹⁸¹ See *Equality Found. IV*, 128 F.3d at 294-95 (explaining that although the *Evans* Court applied rational basis and overturned Colorado's Amendment, the Sixth Circuit affirmed its earlier decision, applying rational basis to the Cincinnati Charter Amendment and upholding it).

¹⁸² See *id.* at 296 (stating that "the Cincinnati Charter Amendment had no such sweeping and conscience-shocking effect, because . . . it applied only at the lowest (municipal) level of government"). This seems to be in accord with Justice Scalia's dissent when the writ of certiorari was granted and the case was remanded to the Sixth Circuit. See *supra* notes 175-78 and accompanying text (discussing dissent from decision to remand).

¹⁸³ See *Equality Found. IV*, 128 F.3d 289, 301.

¹⁸⁴ See *Equality Found., Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-3855, 1998 WL 101701 (6th Cir. Feb. 5, 1998).

¹⁸⁵ *Id.* at *1.

¹⁸⁶ See *id.* at *3.

*Equality Foundation IV*¹⁸⁷ "conflicts with the Supreme Court's decision in [*Romer v. Evans*]."¹⁸⁸

E. The Supreme Court Denied Certiorari

Ultimately, the Supreme Court denied the petition for a writ of certiorari on October 13, 1998.¹⁸⁹ Justice Stevens, joined by Justices Souter and Ginsburg, filed a memorandum opinion, explaining that "the denial of a petition for a writ of certiorari is not a ruling on the merits."¹⁹⁰ Justice Stevens added that the "Court does not normally make an independent examination of state law questions that have been resolved by a court of appeals" and thus, the Court declined the case.¹⁹¹ Since the vigorous dissent from the Sixth Circuit's denial of a rehearing en banc reveals that there is disagreement among the judges of that circuit as to whether *Equality Foundation* was properly decided,¹⁹² it seems uncertain to say, as Justice Stevens does, that the state law question was "resolved" by a court of appeals. Nonetheless, the Court denied certiorari, and it is left to another day, and another case, to see if *Evans* was properly applied.

III: THE SIXTH CIRCUIT ERRED IN DECIDING *EQUALITY FOUNDATION*

In *Romer v. Evans*,¹⁹³ the question was whether Colorado's Amendment 2, adopted in a statewide voter referendum, violated the Equal Protection Clause. Amendment 2 prohibited any legislation, at state or municipal level, granting protected status or protecting individuals against discrimination based on sexual orientation. It was a self-executing statute, having the effect of automatically rescinding some local laws in cities within the state which granted expansive anti-discrimination protection, and included protection against anti-gay bias. Furthermore, since it was a state constitutional measure, a change required

¹⁸⁷ 128 F.3d 289.

¹⁸⁸ *Equality Found.*, 1998 WL 101701, at *3.

¹⁸⁹ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365 (1998).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 366

¹⁹² See *supra* notes 186-88 and accompanying text (discussing the dissent in the denial for a rehearing).

¹⁹³ 517 U.S. 620 (1996); see *supra* notes 109-32 and accompanying text (discussing the facts and rationale of *Evans*).

the arduous process of first amending the state constitution, and then lobbying to get desired local legislation enacted. Also, the *Evans* Court held that the Amendment went beyond denying protected status; the Amendment prevented gays from asserting bias even in common-law situations.¹⁹⁴

In *Equality Foundation*,¹⁹⁵ the question was whether Cincinnati's Issue 3, adopted in a city-wide voter referendum, violated the Equal Protection Clause. Issue 3 prohibited any legislation by the City Council protecting individuals based on sexual orientation. It was a self-executing measure, and had the immediate effect of automatically rescinding those portions of local ordinances which granted expansive anti-discrimination protection based on anti-gay bias. Furthermore, since it was a charter amendment, analogous to a constitutional amendment,¹⁹⁶ a change required the arduous process of first amending the City Charter, and then lobbying the City Council to enact the desired ordinances.

The *Evans* Court examined the facts and found that there was no rational basis justifying the Amendment.¹⁹⁷ The Court found that the Amendment was both improperly motivated to disadvantage an unpopular group, and was too far removed from any suggested proper governmental objective.¹⁹⁸

The *Equality Foundation* court, on remand after the Supreme Court's decision in *Romer v. Evans*, examined the facts and found that the Cincinnati Charter Amendment survived a rational basis review.¹⁹⁹ The distinctions the Sixth Circuit found basically hinge on the difference between a statewide constitutional amendment and a citywide charter amendment.²⁰⁰ The court, distinguishing *Evans*, focused mainly on the geographical scope of the Cincinnati Amendment in comparison to the one in

¹⁹⁴ See *Evans*, 517 U.S. at 630.

¹⁹⁵ See *supra* notes 133–92 and accompanying text (discussing the facts and rationale of *Equality Found.*).

¹⁹⁶ See *Equality Found. II*, 860 F. Supp. 417, 428 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997). "The [Cincinnati] City Charter is the primary governance document of the city, akin to a constitution." *Id.*

¹⁹⁷ See *Evans*, 517 U.S. at 632.

¹⁹⁸ See *id.* at 635.

¹⁹⁹ See *Equality Found. IV*, 128 F.3d 289, 300 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

²⁰⁰ See *id.* at 298–99.

Colorado.²⁰¹ Its rationale is similar to that articulated by Justice Scalia, both in the *Evans* dissent,²⁰² and in his dissent from the Court's order to remand *Equality Foundation* to the Sixth Circuit.²⁰³ As was stated by the Sixth Circuit dissenters from the denial for a rehearing en banc, since "a majority of the Supreme Court obviously did not share the views of the dissent, using the dissent's rationale is itself suspect."²⁰⁴

The Sixth Circuit's reasoning is also faulty in a distinction drawn between the Cincinnati Charter Amendment and Colorado's Issue 3.²⁰⁵ The court stressed that Colorado's Issue 3 was overbroad.²⁰⁶ In making this point, the court quoted the *Evans* Court, which stated, "it is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination"²⁰⁷ The Sixth Circuit said that the Cincinnati Charter Amendment had a "more restricted reach" than the actual and potential sweep of the Colorado Amendment.²⁰⁸ This reasoning is problematic, in that the court focused on theoretical differences between the two enactments, rather than their actual similarities.

Additionally, the Sixth Circuit misread *Evans* when it quoted Justice Kennedy describing the relationship between the Colorado Amendment and rational basis in the terms that "'Amendment 2 fails, indeed defies, even this conventional inquiry,'" ²⁰⁹ and suggested that Justice Kennedy's statement means that the *Evans* Court found that the Colorado Amendment so obviously violated equal protection that even rational

²⁰¹ See *id.* at 296-97 (comparing Cincinnati's Issue 3's scope which is limited to the City, with Colorado's Amendment 3's scope, which covered an entire state).

²⁰² *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); see *supra* notes 126-32 (discussing Justice Scalia's dissent).

²⁰³ 518 U.S. 1001 (1996) (mem.) (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting from decision to remand); see *supra* notes 175-78 (discussing Justice Scalia's dissent from the order to remand).

²⁰⁴ *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 94-3973, 94-4280, 1998 WL 101701 (6th Cir. Feb. 5, 1998) (Gilman, Circuit Judge, joined by Martin, C.J., and Daughtrey, Moore, Cole, Clay, JJ., dissenting).

²⁰⁵ See *Equality Found. IV*, 128 F.3d at 295-96.

²⁰⁶ See *id.* at 295-97.

²⁰⁷ *Romer v. Evans*, 517 U.S. 620, 630 (1996). Note, however, that the *Evans* Court did not rely on this potential problem in making its decision. See *id.*

²⁰⁸ See *Equality Found. IV*, 128 F.3d at 296.

²⁰⁹ *Id.* at 299 (quoting *Evans*, 517 U.S. 620, 632).

basis did not apply.²¹⁰ This Comment suggests that this is a faulty reading, which resulted in the misapplication of *Evans* that was the result of the opinion in *Equality Foundation*.

IV: THE NEXT STEP: INTERMEDIATE REVIEW FOR HOMOSEXUAL STATUS

Although the Supreme Court is loath to create "new" fundamental rights under the Fourteenth Amendment by which challenged laws would be subject to strict scrutiny,²¹¹ there is already in place a valid method of raising the bar for laws which disadvantage gays, and which would only require applying established principles to a "new" situation. That mechanism is to grant "quasi-suspect" rank to homosexual status, and apply intermediate level review to laws such as Cincinnati's Issue 3.

The district court in *Equality Foundation II* extensively discussed the factors for qualification as a "suspect" or "quasi-suspect" class.²¹² These factors are: (1) whether the trait by which an individual is categorized, in this case his or her sexual orientation, bears any relationship to his or her ability to perform, or participate in, or contribute to society;²¹³ (2) whether the

²¹⁰ See *Equality Found.* IV, 128 F.3d at 297 (misinterpreting *Evans* as saying that Amendment 2 "defies" conventional equal protection analysis, and that the ordinary standards of review were "irrelevant").

²¹¹ See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (explaining the reluctance to find "new" fundamental rights, in the course of holding that there is no fundamental right to engage in consensual, homosexual sodomy).

²¹² See *Equality Found.* II, 860 F. Supp. 417, 439 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289 (6th Cir. 1997) (concluding that homosexuals met the criteria for semi-suspect class). As discussed *supra* notes 180–88 and the accompanying text, however, that decision was rejected by the Sixth Circuit, which concluded that gays are not quasi-suspect. See *Equality Found.* III, 54 F.3d 261, 268 (6th Cir. 1995). On remand, the Sixth Circuit, in *Equality Foundation IV*, held that "homosexuals [do] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which defined them as homosexuals was constitutionally proscribable." *Equality Found.* IV, 128 F.3d 289, 293 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998) (adhering to its earlier decision); *Equality Found.* III, 54 F.3d at 266–67 & n.2. "[A]ny attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons 'by subjective and unapparent characteristics such as innate desires, drives, and thoughts.'" *Equality Found.* IV, 128 F.3d 289, 293; *Equality Found.* III, 54 F.3d at 267.

²¹³ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985) (observing that, in gender based cases, what "differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relationship to ability to perform or contribute to society" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality)); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (noting that "the weak congruence between gender

members of the group have any control over the trait by which they are categorized, which in *Equality Foundation* is their sexual orientation;²¹⁴ (3) whether the group's defining characteristic, sexual orientation, is immutable;²¹⁵ (4) whether that group has suffered a history of discrimination based on the trait by which they are classified; for gays, their sexual orientation;²¹⁶ and (5) whether the class is "politically powerless."²¹⁷

Applying these factors to homosexuals, it seems clear that a person's sexual orientation has nothing to do with his or her ability to perform, participate in, or contribute to, society, which is the first factor. The only bar a person's sexual orientation has

and the characteristic or trait that gender purport(s) to represent"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (suggesting that since illegitimacy "bears no relation to an individual's ability to participate in and contribute to society" that a higher than rational basis scrutiny might be warranted); *Equality Found. II*, 860 F. Supp. at 434-35 (discussing the five factors). *But see Cleburne*, 473 U.S. at 442 (holding mental retardation not entitled to intermediate review because the "mentally retarded have a reduced ability to cope with and function in the everyday world"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (finding rational basis appropriate in equal protection challenge to police department's mandatory retirement age because age could have a bearing on an individual's ability to do that particular job).

²¹⁴ See *Cleburne*, 473 U.S. at 441 (indicating that "[b]ecause illegitimacy is beyond the individual's control," that is an important factor in deciding whether to apply a "heightened review"); *Lucas*, 427 U.S. at 505 (same); *Frontiero*, 411 U.S. at 686 (1973) (gender); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (stating that legislation that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish"); *Equality Found. II*, 860 F. Supp. at 434-35 (discussing the five factors).

²¹⁵ See *Cleburne*, 473 U.S. at 442-43 (asserting that the mentally retarded are immutably different from other people); *Frontiero*, 411 U.S. at 686; *Equality Found. II*, 860 F. Supp. at 434-35 (discussing the five factors). *But see Cleburne*, 473 U.S. at 442-43 n.10 (suggesting that immutability is not unanimously considered a relevant factor, and stating that " 'classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant' ") (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980)).

²¹⁶ See *Frontiero*, 411 U.S. at 684-85 (acknowledging that women have endured a long history of gender-based discrimination); *Cleburne*, 473 U.S. at 440 (explaining that discrimination is an important factor in equal protection analyses because discrimination is not likely to be addressed by legislative action); *Murgia*, 427 U.S. at 313 (concluding that uniformed police officers over the age of fifty are not a suspect class, in part because they have not been subject to regular or purposeful discrimination); *Equality Found. II*, 860 F. Supp. at 434-35 (discussing the five factors).

²¹⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (considering whether the group has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *Equality Found. II*, 860 F. Supp. at 434-35 (discussing the five factors).

on one's participation in society is when hostility engendered by others' fear and hatred inhibits a gay person. Homosexuals thus meet the first of the criteria identified by the *Equality Foundation* district court decision. As to the second factor, whether members of the group—homosexuals, lesbians, and bisexuals—have any control over their sexual orientation, the current scientific consensus is that one's sexual identity is established at a young age and is not volitional.²¹⁸ The third factor, immutability, may not even be a key element, as discussed above,²¹⁹ but the same scholars who now believe that homosexuality is not volitional, also believe it to be immutable.²²⁰ The fourth factor, whether the group has suffered a history of discrimination based on their sexual orientation, may be established by a look in the newspapers. One of myriad examples is the recent tragedy of Matthew Shepard, who was savagely beaten to death in Wyoming because he was gay.²²¹ Also, the common practice of staying "in the closet"—hiding one's sexual orientation—is surely a technique used to avoid the discrimination which an openly gay person is likely to be subjected to. The final criterion is whether the class is "politically powerless." An examination of Cincinnati's Human Rights Ordinance makes evidence of gays' political powerlessness clear. The HRO protects Cincinnati's citizens from discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status,²²²—a far more expansive list than is required by federal law—and it once included sexual orienta-

²¹⁸ See, e.g., *Equality Foundation II*, 860 F. Supp. at 424 (describing testimony of Dr. John Gonsiorek, that "sexual orientation is an involuntary status, that it sets in at an early age, that it is unamenable to techniques designed to change it"); see also Patric L. Deprey, *Readers' Forum: Firing of Lesbian Employee Deplored*, THE COURIER JOURNAL, Dec. 8, 1998, at 8A, available in 1998 WL 2118749 (noting that the APA and other groups largely believe that homosexuality is inborn); *Psychiatric Group Condemns Treatment Aimed at Converting Gays*, COLO. SPRINGS GAZETTE TELEGRAPH, Dec. 12, 1998, at 3, available in 1998 WL 23015495 (discussing theory that people are born homosexual). But see Bud Seary, *Don't Buy Into the Gay Rights Groups Sales Pitch*, THE FRESNO BEE, May 10, 1997, at B9 (asserting that while biology may play a part, homosexuality is primarily rooted in environmental factors).

²¹⁹ See *supra* note 215 (discussing immutability factor).

²²⁰ See *Equality Found. II*, 860 F. Supp. at 424; see also Deprey, *supra* note 218; *Psychiatric Group*, *supra* note 218.

²²¹ See Alan Lupo, *Hate Crimes are a Big Deal*, BOSTON GLOBE, Oct. 25 1998, at 6; *Two Women Deny Tie to a Gay Killing*, BOSTON GLOBE, Dec. 10, 1998, at A 20.

²²² See *Equality Found. II*, 860 F. Supp. at 421 (discussing the Human Rights Ordinance).

tion among the other protected groups. The fact that after Issue 3 homosexuals have not only been removed from that list, but have had an onerous procedural burden placed in their way of ever getting back on that list again is evidence of their political powerlessness.

As it did with the gender cases,²²³ the Court may already be cautiously moving toward recognizing status-based sexual orientation as a quasi-suspect class meriting intermediate-level review. In *Reed v. Reed*,²²⁴ the Court purported to be using rational basis review to strike down a statute that classified along gender lines.²²⁵ A few years later, in *Craig v. Boren*,²²⁶ the Court articulated a standard that is now known as intermediate review for the quasi-suspect class, women.²²⁷ The *Craig* Court derived its intermediate test from *Reed*, although the *Reed* Court had announced it was applying rational basis.²²⁸ Similarly, the Court in *Romer v. Evans* claimed it applied rational basis review.²²⁹ In stressing the likelihood that animus toward homosexuals motivated the legislation, however, it dismissed government purposes it could have found legitimate, which suggests the Court was in fact applying some heightened standard.²³⁰ It is possible that just as the Court has signaled, in *United States v. Virginia*,²³¹ that women as a quasi-suspect group may be entitled to more-than-intermediate level review,²³² by the Court's rigorous appli-

²²³ See *supra* notes 61-70 and accompanying text (discussing the development of intermediate scrutiny for gender cases).

²²⁴ 404 U.S. 71 (1971).

²²⁵ See *id.* at 76 (stating that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation' ") (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²²⁶ 429 U.S. 190 (1976).

²²⁷ See *id.*

²²⁸ See *id.* at 197 (relying on *Reed* and articulating the test for gender cases requiring that a challenged law "must serve important governmental objectives and must be substantially related to achievement of those objectives").

²²⁹ See *Evans*, 517 U.S. 620, 635 (stating that "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not") (citations omitted).

²³⁰ Indeed, the *Equality Foundation* court did find almost exactly the same purposes legitimate. See *Equality Found. IV*, 128 F.3d 289, 300 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998) (finding the same purposes legitimate).

²³¹ 518 U.S. 515 (1996).

²³² See *id.* at 533-34 (requiring "exceedingly persuasive" justification standard, which is, possibly, a more-than-intermediate level of review).

cation of rational basis in *Romer v. Evans*,²³³ the groundwork may be under way toward quasi-suspect classification for homosexuals.

CONCLUSION

In deciding *Equality Foundation*, the Sixth Circuit misapplied *Romer v. Evans*. Under *Evans*'s rational basis analysis, where state or local government action is motivated by fear or hatred toward an identifiable group, and the connection between that action and any legitimate goal is too tenuous to be credible, the legislation must fail. The *Evans* Court was too cautious. If it had distinguished between homosexual conduct and homosexuality as a status, it would have been less constrained by the *Bowers v. Hardwick* precedent, and the Court could have acknowledged that homosexual status meets all the established criteria for quasi-suspect classification, meriting intermediate-level review. Under intermediate scrutiny, future constitutional challenges of similar state constitutional and city charter amendments will more predictably yield the result the Supreme Court mandated in *Romer v. Evans*.

Jill Dinneen

²³³ 517 U.S. 620 (1996).

